No. 05-1370

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In The Supreme Court of the United States

KATHERYNE NEVES DA ROCHA, and
MATEUS NEVES DA ROCHA,

Petitioners,

v.

ARKANSAS DEPARTMENT OF
HEALTH AND HUMAN SERVICES

**On Petition For A Writ Of Certiorari
To The Court Of Appeals
Of Arkansas, Division III**

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the state trial court correctly excluded evidence as to cause of injury at the "no reunification" hearing and the termination of parental rights hearing where the issue had previously been litigated and not appealed.

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OPINION BELOW

The opinion of the Arkansas Court of Appeals is reported as *Neves da Rocha v. Arkansas Department of Human Services*, ___ Ark. App. ___, ___ S.W.3d ___, 2005 WL 3307078. It was decided on December 7, 2005. The order of the Circuit Court of Pulaski County, Arkansas, was entered November 16, 2004.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2005. A petition for review in the Arkansas Supreme Court was denied on January 25, 2005. The Arkansas Supreme Court stayed the mandate pending the outcome of this petition.

STATEMENT

The petitioners, Mateus and Katheryne Neves Da Rocha, took their daughter Victoria to Arkansas Children's Hospital on January 15, 2004. At that time, Victoria was found to have multiple fractures including fractures to her right, upper, and lower arms, both upper and lower legs, and multiple fractures of her ribs. The x-rays revealed that some of the fractures were less than two weeks old, and others were about two to four weeks old. Several of the fractures were described as bucket handle fractures, a type of fracture commonly seen in abused children. Victoria was placed in emergency custody on January 22, 2004.

An adjudication hearing was held on March 24, 2004, by the Pulaski County Circuit Court. Several tests had been performed on Victoria and for bone disease without any abnormalities found. Victoria had no symptoms of osteogenesis imperfecta, also known as brittle bone disease. After being placed in a foster home Victoria did not have any new bone fractures. The trial court found that the Department of Human Services had established by a preponderance of the evidence that Victoria was abused by one or both of her parents. The petitioners did not request a new trial, and no appeal was filed.

Next, on May 13, 2004, a "no reunification services" hearing was conducted. At the beginning of the hearing, the attorney for the Department of Human Services made a motion requesting that the complete record of the case be incorporated into the hearing. There was no objection to this motion and it was granted. The trial court Victoria had been subjected to aggravated circumstances, and therefore reunification services were not to be provided.

The final hearing, a termination of parental rights hearing, was concluded on October 29, 2004. The record from the previous hearings was again incorporated into the record of the termination hearing. The petitioners sought to present testimony to disprove that they caused Victoria's injuries. The trial court found that the testimony would not be relevant, and the petitioner's witness was not allowed to testify. Based on the evidence, the trial court found that Victoria had been subjected to extreme and repeated cruelty, that there was little likelihood that services to the family would result in successful reunification, and that one or both parents had committed a felony

assault that resulted in serious bodily injury to a child, the trial court granted the petition to terminate parental rights.

REASONS FOR DENYING THE PETITION

This Court should deny the petition for a writ of certiorari. The Arkansas Court of Appeals correctly held that the circuit court did not violate the petitioners' constitutional right to due process. The state court decision does not substantially conflict with any decision of this Court or any other Court of Appeals. Further review is unwarranted.

It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). In this case, the petition should be denied because the issues presented by the petitioners were not fully addressed in the state court decision. *Heath v. Alabama,* 474 U.S. 82, 87 (1985); *Illinois v. Gates,* 462 U.S. 213, 217-219 (1983). Likewise, the petitioners have not met their burden of showing that the issues were properly presented to the Arkansas Court of Appeals. When the highest state court is silent on a federal question, this Court should assume that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 550 (1987). The petitioner bears the burden of defeating this assumption, *ibid.,* by demonstrating that the state court had "a

fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb*, 451 U.S. 493, 501 (1981). To defeat the assumption, the aggrieved party in this Court must affirmatively show the contrary. *Board of Directors of Rotary Int'l*, 481 U.S. at 550. The petitioners could have done this by including a portion of their state court brief in their appendix detailing their federal question issues. In the Statement of the Case, the petitioners' only reference to their federal question argument was, "In this case the Court of Appeals did not deal with the constitutional issue, although it was presented in the brief." Because there is no proof as to what specific federal issues were raised, the petitioners have not met their burden and therefore the petition should be denied.

Even if the petitioners had affirmatively shown that some federal cases were cited, the cases that were cited were not relevant to the instant case. The petitioners cited two federal cases in their appellate brief – but these cases are in no way relevant to the issues in the instant case. A petitioner must make more than casual connections to show that a federal question is involved. These cases were not sufficiently tied to the issues in this case as to allow the state court to rule on the 14th Amendment constitutional claims.

Additionally, there is no federal question involved in this case because the petitioners were not deprived of their 5th or 14th Amendment due process protections. They were not deprived of the right to be heard, or the right to present a defense. The error made by the petitioners was that they chose not to present their evidence of possible medical causes of their daughter's injuries at the appropriate hearing. The State presented its expert witnesses at

the adjudication hearing. The petitioners could, and should, have presented their rebuttal at that time, but chose not to do so. To further compound their error, they did not file an appeal.

The petitioners would have this Court rule that it is of no consequence that they chose not to present their medical evidence at the adjudication hearing. To the contrary, it is precisely because they chose not to take advantage of the opportunity to present this evidence at the adjudication that the trial court later found the evidence was not relevant at the subsequent hearings. The Arkansas Court of Appeals agreed, and also found that the evidence, because it was not presented at the adjudication, was not relevant to the issue being litigated at the later hearings.

The petitioners' argument that findings using a lower standard of proof were used against them in a subsequent hearing requiring a higher burden of proof is not supported by the totality of the record. As already discussed, at the adjudication hearing, the State presented its evidence to prove that the petitioners caused their daughter's injuries. The trial court found that the State had proven its case by a preponderance of the evidence. Then, the trial court held a "no-reunification services" hearing, the purpose of which was to determine whether reunification services should be discontinued. At the beginning of the May 13, 2004, "No reunification" hearing, the State's attorney requested that the record of the entire case be incorporated into the hearing. The motion was granted without objection. The record was again incorporated at the termination of parental rights hearing. This was a critical motion because, while the adjudication findings

were found by a preponderance of the evidence, the "no reunification services" and termination of parental rights hearings use a burden of proof of clear and convincing evidence. The trial court specifically made findings of fact, based on the record as incorporated, that the petitioners had caused their child's injuries. The petitioners fail to acknowledge that the evidence from the adjudication hearing was considered a second time using a higher standard. In their state court briefs, the petitioners argued "The courts have been crystallinely clear in holding that a finding on a lower standard cannot [be] transplanted in to a subsequent hearing using the higher standard." Because the evidence and testimony from the adjudication hearing was incorporated without objection, and the subsequent "no reunification services" hearing findings were made using the clear and convincing burden of proof, there is no justiciable issue of whether different burdens were applied in this case.

CONCLUSION

The petition for a writ of certiorari should be denied. The petitioners have not shown that there is a federal question than needs to be settled. The issue of abuse is decided at the adjudication hearing. The petitioners did not present their expert at this hearing, and they did not appeal this decision. The record from the adjudication hearing was incorporated at the "no reunification hearing" and again at the termination hearing. The two hearings that are on appeal have the same burden of

proof. Therefore, there was no violation of their 5th or 14th Amendment right to due process.

Respectfully submitted,

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